



IN THE
Supreme Court of the United
October Term, 1988

ALLEN ORGAN COMPANY,

Petitioner,

— v. —

KIMBALL INTERNATIONAL, INC.,
MACMILLAN, INC.,
CONN KEYBOARDS, INC.,

Respondents.

**REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT	
A. Respondent Changed The Facts And Then Argues That No Constitutional Issue Was Presented	1
B. Respondent's Mootness Issue Is Not Well Taken	2
C. The Waiver Issue Is Not Proper	3
CONCLUSION	4

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<i>Allen Organ Co. v. Kimball Int'l, Inc.</i> , 839 F.2d 1556 (Fed. Cir. 1988)	2
<i>Connell v. Sears, Roebuck & Co.</i> , 772 F.2d 1542 (Fed. Cir. 1983)	2

Statutes and Other Authorities

Seventh Amendment to the U.S. Constitution	1, 2, 3
35 U.S.C. § 102 (g)	3

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

A. Respondent Changed The Facts And Then Argues That No Constitutional Issue Was Presented

In opposing the Petition for a Writ of Certiorari, Respondent Kimball's statement of the issues is highly misleading. The premise of the Petition is that there were two equally plausible ways in which an apparent inconsistency in the jury verdict could be reconciled and that the Seventh Amendment to the Constitution precluded selection of one method over the other by the Court of Appeals.

At page 2 of the opposition brief, Respondent concedes the existence of the apparent inconsistency and concedes that Petitioner argued an alternate reconciliation theory before the Court of Appeals. But Respondent argues that the Court of Appeals rejected Petitioner's theory. Then, at pages 9-11, Respondent goes on to argue that Petitioner's proposed reconciliation did not "represent a logical and probable decision on the relevant issues as submitted." Having thus denigrated Petitioner's proposed reconciliation and having implied that the Court of Appeals agreed, Respondent urges that the inconsistent verdict could only be resolved in one way, and hence that the Seventh Amendment permitted the court to adopt that view and enter judgement accordingly.

The fallacy of Respondent's position is that the Court of Appeals did not "reject" Allen's proposed reconciliation. Nowhere in its decision did the Federal Circuit discuss or even mention the reconciliation proposed by Allen. The reconciliation proposed by Petitioner covered not only the prior invention defense discussed in the Petition by way of example, but also covered all the other defenses relating to the specific claims on appeal. Although a major portion of Allen's brief was devoted to this reconciliation, the Court of Appeals' opinion never discussed it.

Instead, the Court of Appeals felt itself obliged to accept the district court's rationalization if it was "logical and probable" under the circumstances "even though other equally persuasive

possibilities might be shown to exist." 839 F.2d. at 1564; App. p. A-17. In short, the Court of Appeals felt it permissible to ignore the "other equally persuasive possibilities," i.e. the reconciliation proposed by Allen, in light of the district court's reliance on Kimball's proposed reconciliation.

This squarely presents the Constitutional issue. By so selecting the Kimball reconciliation, and ignoring the Allen reconciliation, the Court of Appeals and the district court, rather than the jury, became the ultimate finders of fact in violation of the Seventh Amendment.

B. Respondent's Mootness Issue Is Not Well Taken

Referring to an "Exhibit A", which is not part of its brief or Appendix, Respondent seeks to show that even if certiorari were granted and the ultimate issue resolved in Petitioner's favor, the matter would be moot. But Respondent's chart notwithstanding, Petitioner has consistently opposed Respondent's position regarding all of the so-called "anticipation" defenses and explained why each should be reconciled in favor of Allen.

The issue presented in the Petition relates to the inconsistency between the jury's findings on *anticipation* (lack of novelty over prior art) and *non-obviousness* of the invention over the same prior art. Respondent's view of reconciliation, adopted by the Court of Appeals, was that the jury misunderstood the instructions on the obviousness issue and did not mean what it said in its finding of non-obviousness. Petitioner's "equally persuasive possibility" is that the jury's findings on the anticipation issues were not legally sufficient to meet the standards for patent claim invalidity and therefore were fully consistent and reconcilable with the jury's holdings that the same patent claims were not obvious.

Since "anticipation is the epitome of obviousness", *Connell v. Sears, Roebuck & Co.*, 772 F.2d 1542, 1548 (Fed. Cir. 1983), any view accepting the jury's verdict at face value would be hopelessly irreconcilable. And Respondent has, in its proposed statement of issues, conceded the inconsistency. But significantly, Respondent never addresses what the Court of Appeals meant when it referred to an "equally plausible" method of reconciliation. The

omission is cogent. If in fact there were at least two methods of reconciliation, as the Court of Appeals implied, then the Seventh Amendment to the Constitution precludes the adoption of one method at the expense of the other.

C. The Waiver Issue Is Not Proper

As further support for its "mootness" argument, Respondent argues waiver of the "concealment" issue that Petitioner relied upon. Respondent's argument is in error.

The jury was instructed that a successful prior art invention defense against the patent required proof that the prior invention had not been "abandoned, suppressed or concealed." The instructions were correct and therefore not objected to. See 35 U.S.C. § 102 (g). The jury interrogatories, however, on the alleged prior invention called for an express finding on "abandonment" but did not call for a finding on suppression or concealment or an ultimate finding on patent invalidity due to "anticipation." The obviousness findings, in contrast, required the jury to consider the suppression and concealment factors before deciding what could be considered as prior art.

Thus, as Petitioner reconciles the jury's findings on the prior invention defense, the jury found that the subject matter of the prior invention defense was not abandoned but, because it found the prior art insufficient to make the invention obvious, the prior invention was necessarily suppressed and/or concealed. As a result, that prior art was legally insufficient to invalidate the patent claims as anticipated.

CONCLUSION

Respondent does not dispute the fact that this Court has not ruled on the Constitutional impact of multiple methods of reconciling an inconsistency in a jury verdict. That issue is squarely presented in this case. The decision of the Court of Appeals is squarely inconsistent with a reasonable Constitutional interpretation.

The Petition for a Writ of Certiorari should be granted to resolve the issue.

Respectfully submitted,

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